Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CAROL LAWRENCE,
Petitioner,

v.

CURATORS OF THE UNIVERSITY OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

LISA S. VAN AMBURG
VAN AMBURG, CHACKES,
CARLSON & SPRITZER, LLP
8420 Delmar Blvd., Suite 406
St. Louis, Missouri 63124
(314) 872-8420

Counsel of Record
Attorney for Petitioner

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

59pp

QUESTION PRESENTED

Prior to *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000), the District Court and the Eighth Circuit, respectively, granted and affirmed summary judgment for Respondent on Petitioner's Title VII gender discrimination claim.

Are the lower court opinions consistent with *Reeves*?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered February 19, 2000 is reported at 204 F.3d 807 (8th Cir. 2000) and can also be found at 2000 U.S. App. LEXIS 2354 (8th Cir. 2000). A copy of that Opinion, as well as the Denial of Rehearing en banc, 2000 U.S. App. LEXIS 8821 (8th Cir. May 3, 2000) and the Memorandum Opinion and Judgment of the United States District Court for the Eastern District of Missouri, rendered 1/29/99, 1999 U.S. Dist. LEXIS 21179 (W.D. Mo. 1999) are reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

On February 8, 1999, the District Court entered Final Judgment for the University, an Order from which Carol Lawrence timely appealed. The District Court had jurisdiction pursuant to 28 U.S.C. §1343(4), 42 U.S.C. §2000e-(5) and 29 U.S.C.§626(c). *See* Appendix C. The Judgment of the Eighth Circuit Court of Appeals was entered February 18, 2000. *See* Appendix B. The Eighth Circuit had jurisdiction pursuant to 28 U.S.C. 1291. The Court of Appeals denied Rehearing en banc on May 3, 2000. *See* Appendix C. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment, United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury

shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 2000e-2
(Title VII of the Civil Rights Act of 1964)

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. §1981a(c)(1)
(The Civil Rights Act of 1991)

Section 102"(c)Jury Trial. - If a complaining party seeks compensatory or punitive damages under this section -

"(1) any party may demand a trial by jury.

STATEMENT OF THE CASE

This is an appeal from a grant of summary judgment against Petitioner, plaintiff Carol M. Lawrence, on her claim that she was denied promotion and tenure at the University of Missouri, School of Business, because of her gender in violation of Title VII of the Civil Rights Act of 1964. Lawrence filed suit under Title VII and requested a jury trial.

The question before the Court is whether, in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct.

2097, 68 U.S.L.W. 4480 (June 12, 2000), a jury, not a judge, should have resolved the substantive factual disputes. Petitioner requests that this Court grant the Petition for Certiorari, vacate the decisions of the lower courts affirming the grant of Summary Judgment and remand to the Eighth Circuit for reconsideration in light of *Reeves*.

The University conceded Lawrence's prima facie case, offering as its legitimate, non-discriminatory reason the explanation that Lawrence was denied tenure due to the quality of the journals in which she published. Lawrence offered what the dissent characterized as "compelling evidence of pretext"[1] in the form of comparative evidence that the University's standards for promotion and tenure were unequally applied to her as compared to similarly situated males and that the University changed at the "eleventh-hour" the standards for tenure as applied to her. The University's primary reason for denying Lawrence tenure was that she failed to publish in a "top research journal". Lawrence presented evidence that the key decision-makers characterized a journal in which she had published two articles as "second-tier" and "not top quality", while characterizing the **same journal** as one of the "top dozen or so research journals in the accounting field" and "prestigious" in support two years earlier of the tenure application of a comparable male and as a "top research journal" in support of the promotion of the male Chair of the Tenure Committee that turned Lawrence down. The United States District Court for the Western District of Missouri noted that "there are facts in the record that might have justified the conclu-

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[1] See Appendix B, at page A-12.

sion that she had a strong research record," but nevertheless concluded that "there are also facts in the record that provide a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards of some of her colleagues because of the quality of the publications in which her work was published." The district court thus granted summary judgment on the issue of pretext.[2] On February 18, 2000, the Eighth Circuit Court of Appeals, affirmed in a per curiam, published opinion. (Judge Theodore McMillian dissenting). Lawrence requested a Rehearing en banc, which the Eighth Circuit denied on May 3, 2000.

REASONS FOR GRANTING THE WRIT

This case presents, in the summary judgment context, the issues addressed in *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000). *Reeves* held that lower courts err by failing to credit the employee's prima facie case and evidence challenging the employer's "legitimate, nondiscriminatory reasons" in determining, as a matter of law, that the employee failed to prove Title VII discrimination. *Reeves,* 68 U.S.L.W. at 4484. Lower courts further err by crediting the employer's self-serving testimony, when such testimony is impeached or contradicted, by failing to draw all reasonable factual inferences in favor of the employee and by impermissibly substituting the courts' judgment concerning the weight of the evidence for the jury's. *Reeves,* 68 U.S.L.W. at 4484. Finally, the Court made clear in *Reeves* that a prima facie case, combined with sufficient evidence that the employer's asserted justification is false, is normally enough to get to a jury, absent a record that:

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[2] See Appendix C, at page A-33-34.

> conclusively reveals some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.

Reeves, at 68 U.S.L.W. at 4483.

In this case, the District Court and the Eighth Circuit, acting prior to *Reeves*[3] - — applied the very mistaken

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[3] *Since Reeves* was handed down, the Eighth Circuit has given the case scant recognition. As of July 21, 2000, this Circuit has ruled on forty-one summary judgment appeals involving employment discrimination cases. (*See Tokuhoshi v. Tension Envelope*, No. 99-1742 (8th Cir. June 12, 2000); *Kennell v. Gates*, No. 99-1931 (8th Cir. June 14, 2000); *Jackson v. UPS*, No. 99- 2591 (8th Cir. June 14, 2000); *Armstrong v. Todd Mandell Assoc.*, No. 00-1470 (8th Cir June 15, 2000); *Norbeck v. Basin Electric Power*, No. 99-2205, 99-2403 (8th Cir. June 15, 2000); *Henderson v. Simmons Foods, Inc.*, No. 99-1914 (8th Cir. June 16, 2000); *Doumouras v. NW Airline, Inc.*, No. 99-3189 (8th Cir. June 20, 2000); *Hocevar v. Purdue Frederick Co.*, No. 98- 4075 (8th Cir. June 22, 2000); *Stewart v. Pafford Ambulance*, No. 99-2993 (8th Cir. June 22, 2000); *Phillips v. Union Pacific RR*, No. 99-1775 (8th Cir. June 26, 2000); *Stuart v. General Motors Corp.*, No. 99-2769 (8th Cir. June 26, 2000); *Buettner v. Arch Coal Sales Co.*, No. 99- 3348 (8th Cir. June 26, 2000); *Wall III v. Noel*, No. 00-1152 (8th Cir. June 29, 2000); *Horse v. Waterbury*, No. 99-1165 (8th Cir. June 29, 2000); *Crayton v. Cardinal Building*, No. 99-2650 (8th Cir. June 29, 2000); *Simat v. Chi-Chi's Inc.*, No. 99-2805 (8th Cir. June 29, 2000); *Friedman v. City of Jacksonville*, No. 99-3662 (8th Cir. June 29, 2000); *Walker, Jr. v. AR State Hospital*, No. 99-4001 (8th Cir. June 29, 2000); *White v. Rogers*, No. 99-4231 (8th Cir. June 29, 2000); *Bailey v. Anchor Packaging*, No. 99-4272 (8th Cir. June 29, 2000); *Wallace v. Ellisville Health*, No. 99- 3755 (8th Cir. July 3, 2000); *Appelquist v. KATV*, No. 99-4210 (8th Cir.

(Footnote 3 continued on next page.)

standards this Court invalidated in *Reeves*. Therefore, the Court should vacate and remand this decision for reconsideration in light of *Reeves*.

(Footnote 3 continued.)

July 3, 2000); *McAlphin v. Morgan*, No. 99-4112 (8th Cir. July 5, 2000); *Boersig v. Union Electric Co.*,

No. 99-2699 (8th Cir. July 6, 2000); *Price v. McDonnell Douglas*, No. 99-2925 (8th Cir. July 6, 2000); *Gassoway v. Metropolitan*, No. 99-3030 (8th Cir. July 10, 2000); *Armstrong v. United States*, No. 00-1843 (8th Cir. July 12, 2000); *Hogrefe v. State of NE, et al.*, No. 00-1554 (8th Cir. July 12, 2000); *Graham v. Rosemount, Inc.*, No. 99-2634 (8th Cir. July 12, 2000); *Stekloff. v. St. John's Mercy*, No. 99-3016 (8th Cir. July 12, 2000); *Griffin v. SuperValu*, No. 99-2330 (8th Cir. July 14, 2000); *Parish v. Gateway 2000, Inc.*, No. 99-3561 (8th Cir. July 14, 2000); *Sidles v. NE Court of Appeals*, No. 00- 2033 (8th Cir. July 17, 2000); *Hammond v. Northland Counseling*, No. 99-1672 (8th Cir. July 17, 2000); *Peterson v. Apfel*, No. 99-2760, 99-4302 (8th Cir. July 17, 2000); *Nyameke v. Curators of the Univ.*, No. 98-3750 (8th Cir. July 18, 2000); *Taylor v. QHG of Springdale*, No. 99-4207 (8th Cir. July 18, 2000); *Waddell v. University of MN*, No. 99-3120 (8th Cir. July 19, 2000); *McCabe v. IDS No. 625*, No. 99-2617 (8th Cir. July 20, 2000); *Anderson etc, v. State of NE, et al.*, No. 99- 3414 (8th Cir. July 20, 2000); *Calvin v. Yellow Freight*, No. 99-3829 (8th Cir. July 20, 2000); *Ellett v. Big Red Keno*, No. 99-3046, 98-3694 (8th Cir. July 21, 2000); *Mizell v. IBP*, No. 99- 3506 (8th Cir. July 21, 2000); *Sandhill, Inc. v. City of Springfield*, No. 99-3660 (8th Cir. July 21, 2000)).

Of the forty-one summary judgment appeals, thirty-nine summary judgments have been affirmed; twenty-one *per curiam* without opinion, and eighteen with opinion. Two summary judgments were reversed without citation to *Reeves*. Only three decisions have even cited *Reeves*. Two of the three provided an analysis of the decision and its effect, with the most exhaustive analysis coming from a district court judge sitting by designation.

I. THE DISTRICT COURT AND THE EIGHTH CIRCUIT IGNORED CRITICAL EVIDENCE THAT THE UNIVERSITY APPLIED DIFFERENT STANDARDS TO LAWRENCE'S TENURE APPLICATION THAN APPLIED TO SIMILARLY SITUATED MALES

Reeves established that on summary judgment in Title VII cases, lower courts must credit the employee's evidence establishing a prima facie case of discrimination and challenging the employer's "legitimate, nondiscriminatory reasons" for the alleged adverse employment action. *Reeves,* 68 U.S.L.W. at 4484. Here, as in *Reeves,* the District Court failed credit Lawrence's evidence that the University's reasons for denying her tenure were unworthy of belief.[4]

As Judge McMillian noted in his dissent in this case:

> "The Curators have proffered the following explanation for the decision to deny Lawrence tenure:
>
> > 'Lawrence received negative recommendations for promotion in six out of seven levels of review by the University, and her weak research record was cited as the principal reason. The undisputed material facts show that Lawrence did not publish in any top-tier journals, that her publications were all co-authored except for one article arising from her dissertation, and that four of the six outside reviewers who examined her research expressed criticism of her publication record.'

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[4] The University and District Court conceded that Lawrence had made out a prima facie case.

Brief for Appellees at 21.

In response to this justification, Lawrence presented evidence and arguments to discredit each of the reasons given by the Curators for the denial of her tenure application. As I have stated, her burden at the summary judgment stage was not to prove her case, but to show the existence of a genuine issue of material fact. In my opinion, her affirmative evidence of pretext has established an issue of fact as to whether gender played a role in her peers' *subjective* evaluation of her tenure application. *See id.* at 3 (the tenure decision "necessarily entails judgment of quality which is subjectively made by the applicants' peers").

In response to the Curators' assertion that "[t]he undisputed material facts show that Lawrence did not publish in any top-tier journals," Lawrence introduced evidence suggesting that the standards for what constituted a "top-tier" journal changed over time and, moreover, were applied unequally to her as compared with male candidates. For example, in 1992, the Director of the School of Accountancy, Raymond Dockweiler, wrote a letter to the Dean of the Business School, Bruce Walker, supporting a male tenure applicant, Robin Roberts, and stating in connection with Roberts's publications in RIGNA (in which Roberts had published two co-authored articles, *see* Appellant's Appendix at 502-03): "Since RIGNA is a publication of the American Accounting Association (AAA) and is the leading outlet for research in the area of governmental and nonprofit accounting, a growing number of accounting academics view it as a prestigious journal." Appellant's Appendix at 498. By contrast, when recommending to Dean Walker that Lawrence be denied tenure, Dockweiler wrote in 1994- *notwithstanding Lawrence's publication*

of a sole-authored article in RIGNA-that her "lone problem area has been in the area of research. Quite simply she has not yet published in a top-tier research journal." *Id.* at 264.

Similarly, when Dean Walker wrote a letter to the Provost in 1992 supporting Roberts's tenure application, he favorably described RIGNA as "among the top dozen or so research journals in the accounting field." *Id.* at 491- 92. By contrast, in recommending that Lawrence not be granted tenure, Dean Walker wrote in 1994 that the quality of her research fell short-notwithstanding her publication in RIGNA-because she had not published a single article in "a journal clearly recognized as one of the very best in the accountancy field." *Id.* at 253. In other words, while Dockweiler and Walker praised Roberts for publishing in RIGNA, they all but criticized Lawrence for publishing in the very same journal. *[footnote omitted]*

Moreover, a review of the evaluations Lawrence received during her years on the tenure track support the conclusions that she was led to believe, and reasonably did believe, that research journals such as RIGNA were precisely the type of journals the department deemed worthy of tenure track publications. *See id.* at 243 (1990 written evaluation from School of Accountancy Promotion and Tenure Committee) ("the article that you have forthcoming in *Research in Governmental and Nonprofit Accounting* represents a good hit"). In other words , the evidence suggests that Lawrence met the expectations which were presented to her and she only fell short when the critical decision makers *changed* the standards as they applied to her. Indeed, Deputy Chancellor Deaton, upon reviewing Lawrence's application for promotion and tenure described this phenomenon as follows.

> 'She was led to believe that five or six journals articles would be acceptable. . . . [S]he was also assured that nationally recognized peer reviewed journals in her subfields would be acceptable. There is now argument over what constitutes quality journals in this area.
>
> The quality of her work was praised in annual reviews by the departmental [Promotion and Tenure] Committee on a consistent basis. She was urged to generate more quantity of articles which she did in her last couple of years and was then criticized for the lumpy nature of her output.'

Joint Appendix at 544-45.

In my opinion, the apparent eleventh-hour changes in the standards that that were applied to Lawrence-in addition to the evidence of unequal treatment-raise serious doubts about the sincerity of the Curators' first proffered justification for rejecting of Lawrence's tenure application, and warrant letting this case go to trial. *See. e.g., Kobrin v. University of Minnesota*, 34 F.3d 698, 702 (8th Cir. 1994) ("Substantial changes over time in the employer's proffered reasons for its employment decision support a finding of pretext.").

Lawrence has also responded to the Curators' assertion that she was denied tenure in part because her publications "were all co-authored except for one article arising from her dissertation." Again, she introduced evidence indicating that she was treated differently from male tenure candidates on this matter. For example, Robin Roberts had also co-authored all but one of his publications as the time his tenure applications was being reviewed. With respect to Roberts, Dean Walker wrote:

> 'In deciding whether to recommend that an assistant professor be promote and tenured, I consider whether the candidate has established self-sufficiency in the research area. In my judgment, Professor Roberts passes this test. Fist, he has published a sole-authored article in one of the lead journals in the field... Second, he has been the lead author on all but one of his co-authored pieces. Third, he had demonstrated the ability to work with a variety of co-authors, ranging from MU to PhD student to faculty members at other institutions.'
>
> Appellant's Appendix at 492.
>
> By contrast, with respect to Lawrence, Dean Walker wrote: 'It would be desirable if she had demonstrated her self-sufficiency in the research area by having some sole-authored articles, but only the article based on her dissertation falls into that category.' *Id.* at 253."

Lawrence v. Curators of the Univ. Of Missouri, 204 F.3d 807, 809-10 (8th Cir. 2000) *See* Appendix B, at pp. A-7-11.

While conceding that "there are facts in the record that might have justified the conclusion that [Lawrence] had a strong research record"[5] the District Court discounted the weight of that evidence, thus allowing the court to summarily conclude that:

> "[w]hatever inconsistency there is would not support a reasonable inference that Lawrence was subjected to "manifestly unequal" standards, especially given the required level of deference to the expertise necessary in making a tenure decision.

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[5] (Appendix C, at A-30)

> Therefore, the presence of arguably inconsistent comments does not support the reasonable inference that the reasons given by defendant for the denial of plaintiff's application for tenure were pretext for intentional discrimination."

See Appendix C at p. A-32. The District Court's holding is directly in conflict with *Reeves*. Given that the University's primary reason for denial of tenure was the claim that Lawrence did not have a strong research record due to the quality of the journals in which she published, the District Court, having already found that there were facts in the record justifying the conclusion that Lawrence had a strong research record, is required then to let the case go to the jury, because there are sufficient facts in the record challenging the employer's legitimate, non-discriminatory reason. This is not a case in which Lawrence presents a "weak record" of pretext or in which there is "abundant and uncontroverted independent evidence that no discrimination had occurred," such that "plaintiff's prima facie case, combined with sufficient evidence to find the employer's asserted justification false" is still insufficient to allow the case to go to the jury. *See Reeves,* 68 U.S.L.W. at 4483. Thus, the District Court's grant of summary judgment was erroneous.

II. THE DISTRICT COURT DREW ALL REASONABLE FACTUAL INFERENCES IN FAVOR OF THE UNIVERSITY AND MISCONCEIVED PLAINTIFF'S EVIDENTIARY BURDEN

Reeves made clear that in adjudicating summary judgment motions in Title VII cases, lower courts must draw all reasonable factual inferences from an employee's evidence of discrimination in favor of the employee and

may not make credibility determinations or weigh the evidence. *Reeves, 68 U.S.L.W. at 4484.* Furthermore, *Reeves* held that in adjudicating summary judgment motions in Title VII, there are clear and important limitations on the extent to which lower courts can rely upon the moving party's controverted evidence. The Court held:

> [T]he court must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the non-movant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves,* 68 U.S.L.W. at 4484. (citations omitted).

In granting the University summary judgment the District Court relied almost exclusively on controverted evidence of the University:

> As Lawrence points out, there are facts in the record that might have justified the conclusion that she had a strong research record. However, there are also facts in the record that provide a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards of some of her colleagues because of the quality of the publications in which her work was published. ....Therefore, the facts that Lawrence argues demonstrate that she had a strong research record show little more than 'a mere dispute over her qualifications for the position,' and those facts are not sufficient by themselves to raise a genuine issue of material fact on the issue of pretext.

See Appendix at p. A-30-31.

In dismissing what Judge McMillian characterized as "compelling" evidence of pretext to the category of a "mere dispute over qualifications for the position", the District Court violates the holding in *Reeves* that inferences are to be drawn in Lawrence's favor and that lower courts are not to weigh evidence. Furthermore, the District Court concedes that Lawrence made out a prima facie case, that is, that she met the qualifications for tenure. Therefore, it is inconsistent for the court to characterize Lawrence's evidence of pretext as a "mere dispute over qualifications." Nor does the District Court reconcile its finding that Lawrence adduced evidence which could reasonably lead to a conclusion that she had a strong research record with its requirement and pronouncement that she failed to prove that the University's stated reason for denial of tenure (the supposed low quality of the journals in which she published) was "obviously unsupported". The District Court appears to be at variance with *Reeves* in holding Lawrence to a higher standard of proof: "the facts showing pretext 'must be of such strength and quality' to allow a reasonable finder to conclude that the denial of tenure was 'obviously' unsupported or that 'the university *manifestly* applied an unequal standard to her tenure application.' (Citations omitted) *See* Appendix C, at p. A-28. Furthermore, the District Court's concession regarding Lawrence's evidence of a strong research record is inconsistent with the conclusion that Lawrence's record of pretext is "weak". If there is substantial and competent evidence of pretext, then the District Court must draw inferences from that evidence in favor of Lawrence, not the University. The District Court has turned *Reeves* upside down with respect to how inferences are

to be drawn; how evidence of pretext is to be credited and how plaintiff must meet her evidentiary burden in defending summary judgment.

CONCLUSION

Because the lower courts failed to apply the *Reeves* standard for summary judgment motions in Title VII cases, the Court should grant certiorari, vacate the lower court judgments, and remand this case for reconsideration in light of *Reeves*.

Respectfully submitted,

LISA S. VAN AMBURG
VAN AMBURG, CHACKES, CARLSON & SPRITZER, LLP
8420 Delmar Blvd., Suite 406
St. Louis, Missouri 63124
(314) 872-8420
Counsel of Record